

A question of design

The House of Lords' recent ruling of what amounts to a house for the purposes of acquiring the freehold to a property under the Leasehold Reform Act 1967 will come as welcome news to commercial tenants, as Natasha Rees explains



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The question 'what is a house?' does appear to be a fairly straightforward one to answer. Not so, however, in the context of enfranchisement. On 30 January 2008 the House of Lords allowed an appeal brought by the tenant of a property on the Grosvenor Estate (*Boss Holdings Ltd v Grosvenor West End Properties & ors*). The appeal concerned a non-residential tenant's right to acquire the freehold of an unoccupied property under the Leasehold Reform Act 1967 and, more particularly, whether that property constituted a 'house' within the meaning of s2(1) of the Act.

The House of Lords decided that the property could be a 'house' even if it was not physically fit for immediate residential occupation. This decision could lead to a significant increase in the number of claims made by commercial tenants of premises that were, at some point in their history, designed or adapted for living in.

The facts

The property, 21 Upper Grosvenor Street, is a six-storey town house that was originally built in the 18th century as a private residence. It was used as such until 1942, when it was occupied by the free French government in exile. From 1946 onwards the top three floors were fitted out for residential use and the three lower floors were occupied by dress-makers. The commercial use of the lower three floors continued until 1990, after which they fell vacant. The residential use of the top three floors continued a little longer but ended well before the notice of claim under the 1967 Act was served. At the date of the notice the property was unoccupied and in a

dilapidated state. The top three floors of the building were virtually stripped out, although staircases, internal walls and floor joists remained in place.

The law

Under the 1967 Act a leaseholder of a house is entitled to acquire the freehold if certain conditions are met at the date that the notice of claim is served. Since the Commonhold and Leasehold Reform Act 2002 came into force, a tenant is no longer required to have resided in the property for three years as a condition of acquiring the freehold, except in limited circumstances. The tenant needs only to have owned the property for two years. In other words, the test of residence has been replaced by a test of ownership. One consequence of this is that company tenants that previously could not satisfy the residence test may now qualify if they do not occupy the property exclusively for the purpose of their business and can establish that the property is a 'house'.

In order to qualify as a 'house' under s2(1) of the 1967 Act, a property must satisfy two requirements. First, it must be 'designed or adapted for living in' and, if it passes that test, it must 'reasonably be called a house' (see box opposite for the full wording of the subsection).

The court at first instance ruled that the property did not satisfy the first requirement. The judge felt that the words 'designed or adapted for dwelling in' carried with them a notion of premises with 'somewhere to sleep, cook, to wash and simply to be when not out at work'. He felt that there should be a bedroom, kitchen, bathroom, WC and a living room of some kind. The fact that

'As a result of this decision, even if the use of a building has changed, if there has been no substantial change to the original internal layout and it retains a residential character then it may still qualify for enfranchisement.'

Section 2(1) of the 1967 Act

For the purposes of this Part of this Act, 'house' includes any building designed or adapted for living in and reasonably so called, notwithstanding that the building is not structurally detached, or was or is not solely designed or adapted for living in, or is divided horizontally into flats or maisonettes.

the building was essentially a shell meant that none of the usual facilities were present and as a result of this he decided that the building did not qualify. The tenant appealed.

In the Court of Appeal, Edwin Johnson QC on behalf of the tenant argued that since there was no longer a residence requirement, and since a building in mixed use can be a 'house', the correct test to apply was a historical two-stage test, namely, was the building at some time in the past designed or adapted for living in? If the answer to this was yes, the next question was had it retained that configu-

ration or had it been adapted into something else? The Court of Appeal rejected this argument and ruled that the property was not a 'house' for the purposes of the 1967 Act because the property was not, at the date of the notice of claim, designed or adapted for living in. HHJ Tuckey, who gave the leading judgment, described the

not designed or adapted for living in. The tenant, as a result of this decision, was unable to enfranchise.

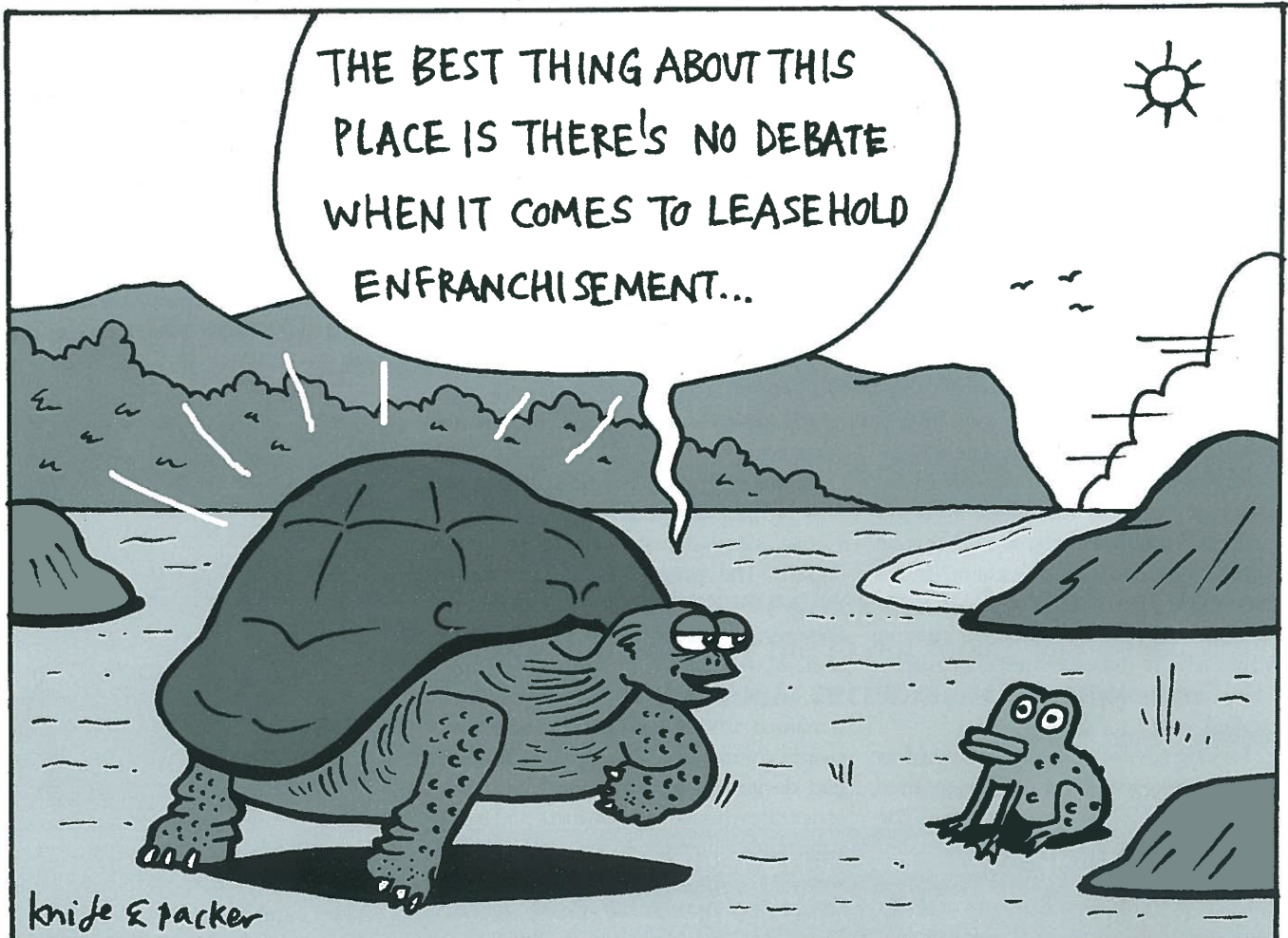
The House of Lords' decision

It was some time after the Court of Appeal decision that the tenant, Boss Holdings Ltd, decided to appeal.

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three upper floors as unoccupied, very dilapidated and incapable of being occupied as residences. He held that since the upper floors were in such a dilapidated state, they were not designed or adapted for anything. The test, according to the Court of Appeal, was a simple one: was the property, viewed at the date of the notice, a residence or was there another purpose? If it was not a residence, it was

Fortunately, the House of Lords granted it leave to appeal out of time. The Lords decided that the various tests that had been applied by the first instance judge and then the Court of Appeal were wrong. They focused on the wording of the 1967 Act and accepted the tenant's argument that there was effectively a historical test to be applied. The leading judgment was given by Lord Neuberger.



He applied what he called the 'natural' meaning of the phrase 'designed or adapted for living in'. He felt that the word 'designed' was a past participle. This meant that it was necessary to consider the property as it was originally built, or the purpose for which it had originally been designed, and then to consider whether it had been subsequently adapted for another purpose, and if so, what.

He also looked at it in the context of the other provisions of the subsection, namely the wording 'was or is not solely designed or adapted for living in'. He felt the word 'was' showed that it was

for residential purposes. Lord Neuberger felt that there had been no substantial alteration to the whole building since its original construction as a house in single residential occupation. Although the property had fallen into a dilapidated state and had been stripped out for a number of years, the upper three floors were, and remained, 'designed' to be lived in.

As a result of this, the property did qualify as a 'house' and the tenant can acquire the freehold. The Grosvenor Estate will now lose a substantial freehold property and, subject to planning or any other regulations applied on the

clearly originally designed as a house. The key question in this case would be whether this was sufficient or whether the 1967 Act does not apply where the adaptation of the house is substantial enough to stop the property being a house. From Lord Neuberger's judgment it would appear that he considered the Act would apply even if a house had subsequently been adapted for another use.

Conclusion

As a result of this decision, the test that must now be applied to a property in order to determine whether it is a 'house' is a two-stage one. It is necessary to consider what the building or property was originally designed for. If it was designed as a residence, it is then necessary to consider whether the property has been adapted substantially enough so that it is no longer designed for the purpose of living in. Even if the use has changed, if there has been no substantial change to the original internal layout and it retains a residential character then it may still qualify.

Since the removal of the residence condition as a requirement for enfranchisement, commercial tenants of buildings that were once former homes have been looking at ways to acquire their freehold. This decision will make things easier for them. It is also an extremely important decision for commercial tenants of mixed-use buildings whose properties have fallen into disrepair. Under the previous law it would have been necessary to put the property back into repair before making a valid claim. It appears that now they are entitled to make a claim irrespective of the state of the building. ■

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referring to 'designed' in the past tense. He also referred to s1(1) of the 1967 Act which, in its original form, required the tenant to have occupied the house as its only or main residence. The requirement that the property should be occupied as a residence was already present in the 1967 Act and there was, in his view, no need for s2(1) also to be concerned with physical occupation. The fact that the residence condition contained in s1(1) had been removed by the 2002 Act also reinforced his view that there were no policy considerations that required the property to be immediately habitable.

Lord Neuberger felt that the test adopted by the courts below, namely whether a property was fit for immediate residential occupation, could lead to uncertainty. If, for example, a new bathroom was being fitted on the date of the notice of claim so that there were no facilities in the property, would this be sufficient to invalidate the claim? In his view, the application of a strict test of fitness for immediate physical occupation would lead to uncertainties as to exactly when and how this test was to be applied.

Having set out what he considered to be the correct test, Lord Neuberger then applied it to the subject property. The property in question had been designed for living in when it was first built in the 1730s. Up until ten years ago the top three floors had been used and laid out

transfer, the tenant will be able to redevelop or use the property as it wishes.

The Lords left open the question of whether the property could still be a 'house' if it was designed as one but has subsequently been adapted for another use. In this appeal it was not necessary to consider this question because any adaptation had resulted in a mixed-use building, and a mixed-use building can still qualify as a 'house' under the 1967 Act. It will be interesting to see how this test is applied to other situations. When *Boss Holdings* was originally considered by the Court of Appeal, it was heard in conjunction with another appeal known as *Mallett & Sons (Antiques) Ltd v Grosvenor West End Properties & anr* [2005], which was being appealed on the same issue.

In that appeal the building in question was a property known as Bourdon House, situated just north of Berkeley Square. The property had once been the residence of the second Duke of Westminster, but at the date of the notice of claim was used as antique showrooms. The original design of the property had remained unchanged but the use was clearly commercial. The Court of Appeal had declared that the property did not constitute a house because there had been substantial alterations to the building meaning that it had been manifestly adapted for commercial use. Under the House of Lords' test, the building was

Boss Holdings v Grosvenor West End Properties & anr (Unreported, Central London County Court, 16 May 2005)
Boss Holdings Ltd v Grosvenor West End Properties & ors [2008] UKHL 5
Boss Holdings Ltd & anr v Grosvenor West End Properties & anr and Mallett & Son (Antiques) Ltd v Grosvenor West End Properties & anr [2006] 1 WLR 2848 (CA)
Mallett & Sons (Antiques) Ltd v Grosvenor West End Properties (Unreported, Central London County Court, 23 November 2005)